LEWIS AND ROCA LLP LAWYERS

ORIGINAL

0000004723

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman

WILLIAM A. MUNDELL
Commissioner

JEFF HATCH-MILLER
Commissioner

MIKE GLEASON
Commissioner

KRISTIN K. MAYES
Commissioner

Arizona Corporation Commission
DOCKETED
MAY 17 2004
DOCKETED BY

RECEIVED
2004 MAY 17 P 4:29
AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE INVESTIGATION OF THE CUSTOMER PROPRIETARY NETWORK INFORMATION (CPNI) NETWORK

Docket No. RT-00000J-02-0066

MCI'S COMMENTS IN RESPONSE TO STAFF'S FIRST DRAFT OF PROPOSED CUSTOMER PROPRIETARY NETWORK INFORMATION RULES DATED APRIL 2, 2004

MCI, Inc., on behalf of its regulated subsidiaries, ("MCI") submits these comments in response to Staff's First Draft of Proposed Customer Proprietary Network Information ("CPNI") Rules dated April 2, 2004. Staff has provided three options for parties to comment upon. For the reasons stated below, MCI recommends that the Staff of the Commission not recommend adoption of any of the three options because they are unconstitutional, disrupt the balance established by the Federal Communications Commission ("FCC"), will cause customer confusion and impose unnecessary burdens on

telecommunications carriers. Rather, MCI strongly encourages the Commission Staff to recommend adoption of the rules established by the FCC on customer privacy and not to create its own independent set of privacy rules that differ from the FCC rules.

GENERAL COMMENTS

The FCC rules were created as a result of extensive debate among industry and consumer groups as well as after extensive litigation. The FCC CPNI rules balance the rights and protections of all involved, including telecommunications consumers. There are no unique or necessary reasons for the Staff to recommend separate Arizona-specific rules to protect consumer privacy. Moreover, adopting and enforcing additional or different privacy rules that apply to telecommunications companies that operate in Arizona would needlessly increase the regulatory burden on companies that do business here.

In implementing section 222(c)(1) of the federal Communications Act, which governs the use and disclosure of CPNI upon the "approval of the customer,"[1] the FCC initially adopted "opt-in" rules that required the express consent of the customer before a carrier could share CPNI with affiliated entities or unaffiliated third parties.[2] The Court of Appeals for the Tenth Circuit invalidated this opt-in regime on the grounds that the Commission had not justified its rules under the First Amendment standards applicable to

---

[1] 47 U.S.C. § 222(c)(1).

[2] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶¶ 87-114 (1998) ("*Second Report and Order*").

governmental regulations of commercial speech articulated in the Supreme Court's *Central Hudson* decision.[3] On remand, the FCC concluded that an opt-in rule for intra-company and joint venture use of CPNI was unconstitutional. Accordingly, the FCC adopted a less restrictive "opt-out" mechanism, allowing intra-company sharing of a customer's CPNI unless that customer has objected to such sharing within a specified waiting period after receiving appropriate notification from the carrier.[4]

The three options proposed are not consistent with the FCC's rules and materially would change the balance that the FCC's rules establish between protecting telecommunications customer's privacy interests and protecting telecommunications carrier's free speech rights. These proposals are not narrowly tailored and will not likely withstand court challenge as discussed below.

All three proposals not only conflict with the spirit and letter of the FCC regulations, but also are likely to be found invalid under current court decisions--the 10th Circuit's *U.S. West* decision and the U.S. District Court of Washington's decision in *Verizon Northwest v. Showalter ("Verizon")*.[5]

---

[3] *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) ("*U.S. West*"), *cert. denied*, 530 U.S. 1213 (2000). *See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980) ("*Central Hudson*").

[4] *Third Report and Order* ¶ 31; 47 C.F.R. § 64.2003(i). The Commission retained an opt-in mechanism for disclosure of CPNI to third parties.

[5] *Verizon Northwest et al. v. Showalter, Oshie, Hemstad and Washington Utilities and Transportation Commission*, 282 F Supp 2d 1187 (W.D. Wash 2003) ("Verizon").

In *U.S. West*, the 10th Circuit held that proposed FCC rules infringed upon marketing activities that are commercial speech subject to constitutional protection. The court also held that, while the FCC had a substantial interest in protecting privacy, the FCC had failed to establish that interest in its record. The FCC had failed to demonstrate real harm and that its method of restricting carriers' commercial speech would alleviate that harm. Finally (and pertinent to the pending proposal), the court found that the opt-in strategy that the FCC had proposed was more extensive than necessary to achieve its goals, and that the government had failed to adequately consider the less restrictive opt-out option.

In the *Verizon* decision, the District Court enjoined the Washington Utilities and Transportation Commission ("WUTC") from enforcing its CPNI rules, which are substantially similar to the Staff's second option of proposed rules. The court stated that "[o]pt-in approaches on the use of CPNI raise serious constitutional issues." First, the court rejected the proposition that rules regulating carriers' use of CPNI do not implicate the First Amendment.[6] As the court explained, CPNI regulations "directly affect what can and cannot be said. Such a restriction, no matter how indirect, implicates the First Amendment."[7] Therefore, state rules that regulate CPNI implicate the First Amendment, and the Arizona Commission should adopt rules that avoid the First Amendment issues

[6] *Verizon*, slip op. at 6-7

[7] *Id.* at 7.

addressed in *U.S. West* and *Verizon*. All three options proposed by Staff restrict protected speech, implicate the First Amendment, and therefore, should not be adopted as drafted.

Second, the court made clear that the WUTC was required not merely to *consider* the constitutional implications of its rules, but to *prove* that the rules could withstand First Amendment scrutiny.[8] Thus, even though the Washington Commission devoted a portion of its order to conducting its own *Central Hudson* analysis, that analysis failed to demonstrate affirmatively the rules' constitutionality.[9] There is no indication that any such analysis has been conducted for Arizona to justify moving away from the FCC's CPNI rules.

Third, the court determined that, because the Washington rules would have conflicted with the FCC's rules regulating interstate services and were "dauntingly confusing and riddled with exceptions," they failed "to advance the state's interest in a direct and material way."[10] Staff's three versions of its CPNI rules cannot be reconciled with the FCC's rules regulating interstate services and are, indeed, dauntingly confusing and riddled with exceptions. Thus, Staff's three options suffer from substantially the same

---

[8] *Id.* at 8. In *U.S.*West, the Tenth Circuit prescribed the FCC's obligation not simply to discuss the First Amendment, but to "'satisfy its burden of showing'" that the rules withstood constitutional scrutiny. *Id.* (quoting *U.S. West*, 182 F.3d at 1239). When the FCC on remand attempted to meet this burden to justify its opt-in regime, it could not do so "despite the laudable efforts of the parties to generate such an empirical record, not to mention [the FCC's] own efforts." *Implementation of the Telecommunications Act of 1996*, Third Report and Order, No. 96-115, FCC 02-214 (July 25, 2002) ("2002 FCC Order") (Separate Statement of Chairman Michael K. Powell).

[9] *Verizon*, slip op. at 14 (holding that Washington's rules failed the narrowly tailored prong of *Central Hudson* even though "the WUTC explicitly considered and rejected an opt-out approach").

[10] *Id.* at 11-13.

deficiencies as did the Washington rules and would also fail the direct advancement prong of *Central Hudson*.

Finally, after reviewing the WUTC's administrative record, rules and order, documents produced in discovery, deposition transcripts, and expert reports, the court determined that Washington failed to demonstrate that its rules were "'no more extensive than necessary to serve the stated interests.'"[11] The court expressly rejected Washington's attempt to justify an opt-in approach on the basis of "consumer complaints" lodged in connection with one carrier's defective opt-out campaign, and held that "*opt-out* notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences."[12]

Section 222 of the Act establishes a national regulatory framework with respect to CPNI.[13] As explained above, there are significant constitutional concerns associated with allowing the states to enact regulations that are more restrictive than the FCC's rules for intra-company CPNI. There is no reason to believe that there are significant state-specific variations with respect to consumers' privacy expectations that could justify stricter regulation of intra-company CPNI in any particular state. Moreover, it is not feasible for many carriers, including MCI, to distinguish between the interstate and intrastate aspects of CPNI.

---

[11] *Verizon*, slip op. at 13 (quoting *U.S. West*, 182 F.3d at 1238 (quoting *Coors Brewing*, 514 U.S. at 486)).

[12] *Id.* at 15-16 (emphasis added).

[13] 47 U.S.C. § 222.

Given the relevant court decisions and the FCC rulings with respect to the constitutionality of opt-in rules, none of the three options proposed by Staff which are more restrictive than the FCC's current opt-out rule, would be constitutional. Under *Central Hudson*, a regulation restricting commercial speech is unconstitutional unless the government can show that: (i) it has a substantial interest in regulating the speech in question; (ii) the restriction in question directly and materially advances that interest; and (iii) the regulation is narrowly drawn.[14] It is highly unlikely that the Arizona Commission could develop record evidence with respect to any of these three criteria that is significantly different from that already developed by the FCC in the *Third Report and Order*.

The Staff has not demonstrated that Arizona has a significantly greater interest than the FCC in regulating the intra-company use of CPNI or that the relevant facts will vary significantly from state to state. For instance, in applying the first prong of the *Central Hudson* test, the FCC determined that section 222(c)(1) "assumes a minimum level of customer concern regarding certain uses of CPNI by a carrier and its affiliate[,]" and that this assumption was "borne out by evidence in the record[.]"[15] It is difficult to see how any state could develop record evidence showing that consumers in that particular state have developed a level of concern for *intrastate* aspects of CPNI that is significantly higher than the level already identified in the *Third Report and Order*. Indeed, it is highly

[14] *Third Report and Order* ¶ 27.

[15] *Third Report and Order* ¶ 33.

unlikely that consumers have developed *any* privacy expectations with respect to intrastate CPNI that are different from their expectations regarding interstate CPNI. The FCC has already taken account of the best available record evidence regarding consumers' expectations with respect to the intra-company use of CPNI and has found that only the less restrictive opt-out mechanism passes constitutional muster. If the Arizona Commission adopts one of the Staff options, the only result of such an outcome would be to encourage a patchwork of inconsistent state regulations that cannot be sustained on constitutional grounds.[16]

Moreover, if the Arizona Commission adopts different CPNI rules from those established by the FCC, it is likely to impose significant costs on carriers and consumers alike. Many carriers, including MCI, do not distinguish between the inter- and intrastate aspects of CPNI, and it would be infeasible – both operationally and economically – for them to institute systems that could make such distinctions.[17] As a result, to the extent Arizona enacts more restrictive regulations of intrastate CPNI, carriers likely would be forced to apply those regulations for all aspects of CPNI. In addition to imposing significant costs, this result would clearly violate carriers' First Amendment rights by effectively requiring carriers to comply with CPNI rules that are more restrictive than the Commission has found to be permissible under the Constitution.

---

[16] At least two states have already proposed rules that appear to be unconstitutional. *See* Wa. Admin. Code § 480-120-203 (proposed); *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights* and *Consumer Protection Rules Applicable to All Telecommunications Utilities*, Rulemaking 00-02-004, Appendix B (CA P.U.C. July 17, 2002).

[17] *See Verizon Petition* at 5-6.

In addition, the Arizona Commission should not adopt a more restrictive mechanism for disclosure of CPNI to third parties. The FCC rejected just such an approach. In the *Third Report and Order*, the Commission noted that "[r]equiring express prior written approval, such as a letter of authorization, would be the most restrictive means of obtaining customer approval" for disclosure of CPNI to third parties.[18] The FCC rejected this overly restrictive approach and explained its reasons for so doing.[19]

SPECIFIC COMMENTS

These proposed rules require an opt-in mechanism and, even where the rules permit opt-out, require the customer to confirm the opt-out using a verification method comparable to those that are required to confirm a PIC switch. These rules certainly raise the concerns expressed by both courts.

Not only are all three proposals stricter than the FCC's because they do not really provide for opt-out approval (Option 1 does not provide for it at all), but the proposed opt-out requirement is actually stricter than the FCC's opt-in requirements. By requiring verification of opt-out approval (Options 2 and 3, R14-2-xx06), Staff is essentially requiring expressed (or "opt-in") consent. Even the FCC's "opt-in" which requires affirmative, expressed consent does not require such consent to be in writing or verified by a third party.

---

[18] *Third Report and Order* ¶ 60. It is also worth noting that section 222(c)(2) of the Act (on which the ACC relies) does not require "written consent" to disclose to a third party; rather, it requires "disclosure upon written request by the customer[.]" In other words, a written request is a sufficient but not a necessary condition for disclosure.

[19] *Id.* ¶ 61.

Since the proposed rules effectively require expressed "opt-in" consent, the Staff's proposed requirement under all three options that a telecommunications carrier require execution of proprietary agreements with affiliates (an undefined term), joint venture partners (also undefined) and/or independent contractors (undefined term) is unnecessary and burdensome, even with non-affiliated third parties. The FCC requires these types of agreements when getting opt-out approval from affiliate/joint venture partners, so that CPNI is not subsequently released to those for whom opt-in approval was necessary. Staff is also requiring proprietary agreements if the carrier already has the consumer's expressed consent to share the information with third parties. See Rule R14-2-xx07(C) for Options 1 and 2 and Rule R14-2-xx06(C) for Option 3. Moreover, the verification process required for "opt-out" essentially destroys the "opt out" process and makes it effectively an "opt-in" process. Finally, "a reasonable time" for verification of a customer's opt-out approval is an undefined concept and subject to many interpretations.

The FCC rules do not address or define call detail separate from CPNI. The proposed rules on call detail are confusing, and the Arizona Commission should not define or regulate call detail separate from CPNI. See Option 2, Rule R14-2-xx02(1).

MCI needs the ability to obtain customer's agreement to the use of CPNI through MCI's standard contracting process. As a result, special requirements on the form and format of CPNI-related communications (e.g., that notice be separate from any other documentation, and in Spanish) are unnecessarily burdensome. By requiring that a CPNI notice be put on the company's website, the Staff seems to recognize the usefulness of this

tool, at the same time that it would seek to undermine it by requiring multiple state-specific language requirements. The net result will be customer confusion, rather than clarity, which does not serve the overall goal of helping customers understand and protect their privacy interests.

The requirement for monthly invoice messages regarding status is onerous and impractical. See Rule R14-2-xx06 for Option 1 and Rule R14-2-xx07 for Options 2 and 3. MCI uses invoice messages to communicate new information to customers periodically on its invoices and to have this avenue taken over by a mandatory "built-in" status is not justified by the benefit. The alternative of a quarterly letter is similarly redundant, onerous, expensive and is likely to confuse recipients. The same may be said of the "Confirming A Change In a Telecommunications Company's Authority to Disseminate A Customer's CPNI" which also appears in all three options.

With respect to the sharing of information with affiliates and third-parties, the Staff's proposed additional restrictions are out of step with the careful, narrowly-tailored balance established by the FCC. Under the FCC rules, carriers with opt-in approval to share CPNI with third parties need not enter into proprietary agreements with third parties. The requirement preventing a provider from using CPNI based upon a customer's opt-in approval until 30 days after mailing a confirmation is duplicative when the provider already has the customer's explicit approval to use such information. (See, Rules R14-2-xx08 in Option 1, R14-2-xx09 in Options 2 and 3.)

MCI recommends that the Commission use the type style and size standard that the FCC regulations typically require--type of a style and size to be "clearly legible" instead of mandating a 12 point font. (See, Rule R14-2-xx04(3) for all 3 options.)

In proposed Rules R14-2-xx07(B) and (C) in Option 1 and R14-2-xx08(B) and (C) in Options 2 and 3, it is not clear what is meant by "customer information" and how it differs from CPNI.

Finally, all of the proposed options, as a practical matter, appear to prohibit oral consent for the use of private account information because of the expanded verification requirements from those required by the FCC. The practical result of this proposal--effectively requiring written opt-in approval -- would block the development of competitive local service in Arizona.

Under current law, after obtaining oral consent from a customer, a competitive local carrier can access a prospective customer's existing service record with the incumbent local provider before submitting that customer's new service order, thereby ensuring its accuracy and completeness.[20] The FCC regulations contain an exception for this "real

[20] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, paras. 434-5 (1999)("UNE Remand Order") ["[I]ncumbent LECs have access to exclusive information . .. needed to provide service [such as] customer service record information ....[T]he incumbent LEC has access to unique information about the customer's service, and a competitor's ability to provide service is materially diminished without access to that information . . . competitor[s] run[] the risk of offering a lower quality of service from the perspective of the end-user if it does not know all the details of the customer's current service offering."]; See also, *Id*, para. 435. An ILEC's obligation to provide access is not limited to situations where the CLEC is placing an order for unbundled elements or resold service. "[L]ocal exchange carriers may need to disclose a customer's service record upon the oral approval of the customer to a competing carrier prior to its commencement of service as part of the LEC's obligations under sections 251(c)(3) and (c)(4)." *Implementation of the Non-*

time" use of CPNI while the competitive carrier is still on the telephone with a customer who has indicated a desire to subscribe to new local service. Once the customer has given oral approval, the new carrier can electronically access the prospective customer's existing local service record with the incumbent provider, confirm the customer's existing features and calling plan, and thereby ensure that the new service order is placed correctly. This existing process has been in place for years now in a number of states. The prohibition of oral consent here would block this process, halting the development of competitive local service, and setting up a conflict with existing practice.

It is not possible to first send the customer's oral consent to a third-party verifier before accessing the customer service record. That information is used to confirm the sales order that is sent to the independent third party for verification -- consistent with federal requirements -- after the sales call has been completed. Federal law prevents the sales agent from remaining on the call while the sale is independently verified, and the successful completion of the verification allows the order to be put through to the incumbent local carrier. This process simply cannot accommodate a separate verification of the customer's oral consent to view his or her existing local features and calling plan, which practically must be reviewed with the customer before the sales order is submitted to third-party verification and (assuming the sale is verified) provisioning.

Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115 and 96-149, para. 84 (1998); Order on Reconsideration, para. 85.

As the FCC has recognized, the carrier obtaining the customer's oral consent ultimately has the burden of demonstrating that it received that consent. There is no doubt that a carrier must accept a customer's oral direction when it is to opt-out or to decline to grant consent; a carrier should likewise be able to accept the customer's oral direction when it is to opt-in and grant consent.

CONCLUSION

For the reasons stated above, MCI requests that the Staff of the Commission not recommend adoption of any of the three options it has proposed because they are unconstitutional, disrupt the balance established by the FCC, will cause customer confusion and impose unnecessary burdens on telecommunications carriers. MCI strongly encourages the Commission Staff to recommend adoption of the rules established by the FCC on customer privacy found at 47 CFR §64.2001 *et seq.* and not to create unique privacy rules that differ from the FCC rules.

SUBMITTED this 17th day of May, 2004.

LEWIS AND ROCA LLP

Thomas H. Campbell
Michael T. Hallam
40 N. Central Avenue
Phoenix, Arizona 850004
(602) 262-5723

- AND -

LEWIS AND ROCA LLP LAWYERS

Thomas F. Dixon
MCI, Inc.
707 17th Street
Denver, Colorado 80202
(303) 390-6206

Attorneys for MCI

ORIGINAL and thirteen (13) copies of the foregoing filed this 17th day of May, 2004, with:

The Arizona Corporation Commission
Utilities Division – Docket Control
1200 W. Washington Street
Phoenix, Arizona 85007

COPY of the forgoing hand-delivered this 17th day of May, 2004, to:

Maureen Scott
Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Ernest Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Lyn Farmer, Chief Administrative Law Judge
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Christopher Kempley
Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

LEWIS AND ROCA LLP LAWYERS

COPY of the foregoing mailed this 17th day of May, 2004, to:

Timothy Berg
Fennemore Craig, P.C.
3002 N. Central Avenue, Ste. 2600
Phoenix, Arizona 85012-2913

Joan S. Burke
Osborn Maledon, P.A.
2929 N. Central Avenue, Ste. 2100
Phoenix, Arizona 85012-2794

Michael W. Patten
Roshka Heyman & DeWulf, PLC
One Arizona Center
400 E. Van Buren Street, Ste. 800
Phoenix, Arizona 85004

Gregory Kopta
Davis Wright Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

Mary B. Tribby
Richard S. Wolters
AT&T Communications
1875 Lawrence Street, Ste. 1503
Denver, Colorado 80202

Jon Poston
ACTS
6733 E. Dale Lane
Cave Creek, Arizona 85331-6561

Eric S. Heath
Sprint Communications
100 Spear Street, Ste. 930
San Francisco, California 94105-3114

Robert E. Kelly
Allegiance Telecom of Arizona, Inc.
1919 M Street NW, Ste. 420
Washington, DC 20036

Scott Wakefield Residential Utility Consumer Office
1110 W. Washington Street, Ste. 220
Phoenix, Arizona 85007

LEWIS AND ROCA LLP LAWYERS

Jeffrey W. Crockett
Snell & Wilmer LLP
One Arizona Center
Phoenix, Arizona 85004-2202

Steven J. Duffy
Isaacson & Duffy P.C.
3101 N. Central Avenue, Ste. 740
Phoenix, Arizona 85012-2638

Curt Huttsell
Citizens Communications
4 Triad Center, Ste. 200
Salt Lake City, UT 84180

Betty J. Griffin